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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

BECKLEY NEWSPAPERS CORPORATION, *Petitioner*

v.

C. HAROLD HANKS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

Petitioner, Beckley Newspapers Corporation, prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Wyoming County, West Virginia, entered in the above-entitled case.

OPINIONS BELOW

The Circuit Court of Wyoming County, West Virginia, did not write an opinion. In denying petitioner's three petitions seeking review of the circuit court judgment, the Supreme Court of Appeals of West Virginia did not write an opinion.

JURISDICTION

The judgment of the Circuit Court of Wyoming County sought to be reviewed was entered on June 25, 1966. See Order of June 25, 1966, Appendix A. The judgment was made final by an order of the Supreme

Court of Appeals of West Virginia entered May 12, 1967, refusing for the third time to review the judgment of the circuit court; two judges voted to hear the case. See Order of May 12, 1967, Appendix B. Under these circumstances, the Writ of Certiorari runs to the trial court. See *American Ry. Exp. Co.* v. *Levee*, 263 U.S. 19 (1923); Stern & Gressman, *Supreme Court Practice* 88 (3d ed. 1962). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. The judgment of the circuit court violates the rights of petitioner guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

1. Does a libel judgment against petitioner in favor of a public official deprive petitioner of its constitutional rights where the record contains no evidence of actual malice as defined by this Court?

2. Does a state court's instruction to a jury that it can return a libel verdict against petitioner in favor of a public official without any finding of actual malice, as defined by this Court, deprive petitioner of his constitutional rights?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

Amendment I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Amendment XIV:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE[1]

Respondent C. Harold Hanks, Clerk of the Criminal and Circuit Courts of Raleigh County, West Virginia since 1956, brought a suit for libel against petitioner and recovered judgment for $5,000 on a jury verdict. The judgment against petitioner is in clear violation of the letter and spirit of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and succeeding cases.[1] The record is devoid of evidence of actual malice; and the case was given to the jury under an instruction held to be improper by this Court in *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966).

The petitioner, a corporation, owns two newspapers in Beckley, Raleigh County, West Virginia. The afternoon newspaper, *The Raleigh Register*, is Democratic. The morning paper, the *Beckley Post-Herald*, which printed the alleged libelous editorials, is Republican. Petitioner's newspapers have a history of active and vigorous comment on matters of local political importance. George Warren Hodel, president and general manager of petitioner, testified that it has been the long-term policy of the corporate management to encourage the editors of each paper to give its readers independent appraisals of office holders and candidates for public office. (Transcript 97-99.)[2]

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[1] *Curtis Publishing Co.* v. *Butts*, 87 S. Ct. 1975 (1967); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966); *Linn* v. *United Plant Guard Workers of America*, 383 U.S. 53 (1966); *Henry* v. *Collins*, 380 U.S. 356 (1965); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964).

[2] Record, Transcript in *Hanks* v. *Beckley Newspapers Corporation*, Civil Action No. 16061, Circuit Ct., Wyoming County, West Virginia, May 31-June 1, 1966. [Hereinafter cited as "Tr."]

I. The Evidence Adduced at Trial

The *Post-Herald* had run two editorials critical of respondent during 1960 and 1961 on two substantive matters: his opposition to the fluoridation of the water in the Beckley area, and his use of his influence to have a road to his house paved by the state.[3] Nonetheless, the paper conceded that respondent had done a "reasonably good job as clerk of our courts." (Tr. 30.)

When respondent announced his intention to run for re-election in 1962, the *Post-Herald* ran three editorials commenting on his candidacy. Respondent charged that these three editorials published during the campaign contain libelous material.[4] The first was published on January 16, 1962, entitled "Hanks Will Come To See You Every Six Years!" The portion of this editorial containing the alleged libel is as follows:

> "A dispatch in the Sunday Post-Herald and Raleigh Register quoted C. Harold Hanks to the effect that he planned to resole his shoes in preparation for a door-to-door campaign in hopes of being renominated as circuit clerk.
>
> "We didn't think that this was going to be necessary; we understood that Clerk Hanks had managed to get the state to pave a virtually private road to his doorway.

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[3] The complete text of these two editorials is set out in Appendix D attached to this petition. The uncontradicted testimony establishes that respondent did use his influence to have the road paved (Tr. 55A-68) and that he was an outspoken opponent of fluoridation of the community's water. (Tr. 55.)

[4] The complete text of these three editorials is set out in Appendix D attached to this petition.

"We were had to believe that he could get out by automotive power now and wouldn't have to go on foot.

". . . .

"And speaking more personally, we won't mind at all if he spares us the worn-out brogan and grubby paw act! We weren't impressed the last time around. And repetition doesn't lend enchantment. Distance does, Mr. Clark." (App. C, pp. 4a-5a.)

Respondent charged that the above statement that he "managed to get the state to pave a virtually private road to his doorway" was libelous per se in that it implied he had misused his office for private gain. Respondent did not dispute the fact that he made vigorous efforts to get the road paved. (Tr. 65-A.)

Respondent, who had conducted a house-to-house handshaking campaign in 1956 (Tr. 29, 79), further charged the above edit rial reference to the "worn-out brogan and grubby paw act" was libelous per se because it carried the innuendo that respondent "had dirty and grimy hands which he would repulsively inflict upon other people by a handshaking campaign." Record, p. 15.

The second alleged libel was contained in an editorial entitled "The Fluoridation Situation Remains Unchanged" in the *Post-Herald* on September 4, 1962. It criticized respondent for his opposition to the fluoridation of the city's water supply in the following language:

"About the middle of last month we wrote here at some length about the situation in regard to Beckley's water supply and the failure of thou-

sands of Raleigh County children to gain the considerable benefits of fluoridation.

"Admittedly, we romped pretty heavily upon Circuit Clerk Harold Hanks and Mrs. Elinor Hurt, president of the Raleigh County Board of Health. We thought it was something they deserved. We still do. [The editorial referred to in the above text is not in the record.]

"We did not hear anything directly from either of the two denizens of the Raleigh County Courthouse. But indirectly we got the word of their displeasure. One way or another, word of this sort of thing always gets around.

". . . .

"She [Mrs. Hurt] pleads that she is not a political power, and that because she receives no pay for some of these jobs she should not be subject to criticism concerning them.

"Here, again, she seems to want to follow in the footsteps of Hanks. For it was Hanks who ordered over the telephone once that he did not want his name to appear in the Beckley Post-Herald again. He backed up this order with an inexplicit threat —one merely intended to frighten those who are easily intimidated.

"The only conclusion to which we can come is that either Hanks and Mrs. Hurt have been in league toward the fanatic end, believing all the wild-eyed ravings against fluoridation despite decades of experience to disprove them, or that perhaps his blustering threats were able to intimidate the lady." (App. C, pp. 5a-6a.)

Respondent charged that this editorial is libelous on the theory that it attributed to him a propensity for threats and intimidation. Respondent denied he intended to threaten the editor of the *Post-Herald*. He

admitted, however, calling the editor on a Sunday morning and telling him "I felt like I was being severely criticized and I did not appreciate that as an office holder." (Tr. 58-59.) He also admitted that he asked petitioner's editor to meet him in the "city's parking lot in front of" the petitioner's office "to discuss this situation to prevent any further such editorials." (Tr. 59.)

The third editorial, published November 5, 1962, on which the respondent bases his suit for libel is entitled "As We See the Men, Issues To Be Decided." It makes recommendations and offers opinions with respect to all the candidates in the election. Its comments on respondent, which are not prominently placed in the editorial, are as follows:

> "We cannot make any real case for Emery E. James of Cirtsville to be a topnotch circuit clerk, but the incumbent, C. Harold Hanks, makes him look good nevertheless. Hanks has made it clear that he cares not at all about our children in delaying needed fluoridation of the local water supply by two years or more. He has also been reported as saying he would fight it further after the election.
>
> "Hanks is really a rather unsavory character." (App. C, p. 9a.)

The respondent alleged that the last phrase caused his "neighbors and other good and worthy citizens . . ." to "suspect and believe, the plaintiff [respondent Hanks] to have been and to be, physically unclean; and to have been, and to be, morally offensive and a person to be avoided or abhorred. . . ." (Record, p. 17.)

This Court has stated that a public official cannot recover damages "for a defamatory falsehood relating

to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times* v. *Sullivan*, 376 U.S. at 279-80. The definition of actual malice has been subsequently refined to permit recovery only where the evidence affirmatively established that the publisher was aware of the falsity or probable falsity of the facts stated.[5] *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964); *Curtis Publishing Co.* v. *Butts*, 87 S. Ct. 1975 (1967).

The complaint itself does not even allege that petitioner published its statements about respondent with actual malice as defined by the Court. For this reason, defendant moved for judgment on the pleadings prior to the trial. The motion was denied by the trial court. On May 31, 1966, at the beginning of the trial, petitioner's motion for summary judgment on the same ground was denied. (Tr. 8-9).

The trial record does not contain a scintilla of evidence that petitioner's editorials were written with

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[5] When a public official is involved, proof of negligence is insufficient under *New York Times*. *Cf. Curtis Publishing Co.* v. *Butts*, 87 S. Ct. 1975 (1967). The "actual malice" which must be shown is not equivalent to "unreasonableness" of the publisher's belief in the truth of his statements:

> "The reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard-of-truth standard . . . . The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." *Garrison* v. *Louisiana*, 379 U.S. 64, 79 (1964).

Nor does the fact that an investigation might have shown that the statement was false make the publisher liable. See *New York Times* v. *Sullivan*, 376 U.S. at 282, 287.

actual malice as defined by the Court. On the contrary, the president of petitioner explained the careful manner in which editorials were prepared. (Tr. 124.)

The testimony offered by respondent can be briefly summarized. He introduced the three editorials which he claimed were libelous per se. The sole evidence which respondent offered at trial relating to malice was two other editorials published in 1960 and 1961.* (Tr. 20.) These editorials criticized petitioner on precisely the same grounds as the editorials which are the basis of this suit, *i.e.*, that respondent was using the influence of his position to get a road built to his doorway and to oppose fluoridation of the city water supply.

The editorials were admitted over objection

> "for the limited purpose of showing the state of mind of the composer of the articles complained of as the subject matter of this suit." (Tr. 28.)

The theory of the trial court appears to be that prior criticism of respondent's conduct may be used to show that subsequent criticism on identical grounds was malicious.

In addition to the submission of the written documents above cited, respondent and one other witness testified. Respondent admitted that he had used his influence to have the road to his house paved. (Tr. 52.) He also admitted that he had publicly and actively opposed fluoridation. (Tr. 53-55.) He claimed that neither of these activities had been carried on in his official capacity. (Tr. 50, 56.)

The balance of respondent's testimony consists of vague generalizations as to the extent of his injury.

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* See text of these two editorials, Appendix D, p. 11a.

He insisted that the editorials subjected him to public abuse, although he was unable to name anyone who had abused him. (Tr. 80-81.) Nonetheless, he was re-elected after the editorials appeared by a greater majority than in his previous election which was held before publication of the editorials. (Tr. 82-83.)

The other witness for respondent was Mrs. Hurt, President of the Raleigh County Board of Health, who also opposed fluoridation. She testified that she had never been threatened by respondent. But her testimony did not suggest that Petitioner knew or should have known that this was the case. Moreover, petitioner's editorial of September 4, 1962, stated only that she *might have* received intimidating threats from respondent. (App. C, p. 6a.)

None of the testimony offered by respondent is even *relevant* to proving "actual malice" as defined by the decisions of this Court in cases involving liability for criticism of a public official. At the close of respondent's case, petitioner moved for a directed verdict (Tr. 91-93), renewing the motion at the end of its own case. (Tr. 128.) Petitioner relied on *New York Times* v. *Sullivan* and pointed to the total absence of evidence of actual malice.[6] Both motions were denied, and the case was submitted to the jury.

II. The Charge to the Jury

The charge to the jury was clearly erroneous under the *New York Times* and subsequent decisions. This Court has reversed a number of similar cases because of the inadequacy of the jury instructions.[7]

The court gave several instructions in general terms informing the jury that malice was required in order

[7] See footnote 9, *infra*.

to make a defendant liable for defamation of public officials. But the only instruction given with respect to what constitutes malice was plaintiff's instruction number three which reads, in part, as follows:

> "However, even if the words complained of are libelous per se, and are false, before a plaintiff can recover you must believe from the evidence that they were published with malice—and in this case, malice means that the publisher knew them to be false or used them with reckless disregard of whether they were true or false, *or used them with bad or corrupt motive.*
>
> "Applying these principles more clearly to this case, you, the jury, are hereby instructed that the language complained of by the plaintiff, Harold Hanks, is libelous per se; that it was used by the Beckley Newspaper Corporation upon a public occasion in commenting upon matters of public interest and that this was a privileged occasion; that nevertheless the plaintiff, Hanks, is entitled to recover damages from the defendant herein and you should find your verdict for him, if you believe from the evidence that the charges or statements complained of were false and that the publisher at the time knew they were false or published them with reckless disregard of whether they were true or false *or published them with hatred, or revenge, or from personal spite, ill will or a desire to injure plaintiff.* And if you the jury so believe it is no defense that they were published in an election year or in an election campaign or that the plaintiff was a public official." (Tr. 133-34.) [Emphasis supplied.]

Petitioner objected to this instruction, citing *New York Times* v. *Sullivan*. (Tr. 131.) This instruction is in direct contradiction to the controlling authorities of this Court on the issue of liability for criticism of a public official. See cases cited, n. 1, *supra*.

The jury returned a verdict for respondent for $5,000. Petitioner's motion to have the jury's verdict set aside was denied.

Petitioner sought review in the Supreme Court of West Virginia three times. Petitioner fully argued that the decisions of this Court required review of previous West Virginia decisions; that there was no evidence presented in the circuit court of actual malice as defined by this Court; and that the charge to the jury improperly stated the definition of actual malice. Respondent filed no brief in opposition. The Supreme Court of West Virginia refused to hear the case.[8]

REASONS FOR GRANTING THE WRIT

Although there are no written opinions below, this case is in fact a repudiation by the Supreme Court of West Virginia of the rulings of this Court. The trial judge permitted the case to go to the jury despite the complete absence of evidence of actual malice as the term has been defined by this Court, and the case was given to the jury under a totally improper instruction. Nonetheless the Supreme Court of West Virginia refused to hear the case. If this Court permits this judgment to stand, its decision in *New York Times* v. *Sullivan, supra*, will be a dead letter in West Virginia.

The issues involved in this case are at the very core of those rights of expression which the *New York*

[8] In West Virginia there is no appeal as of right. "A writ of error, supersedeas, or appeal shall be allowed only by the supreme court of appeals, or a judge thereof, upon a petition assigning error in the judgment or proceedings of the inferior court and then only after said court or judge shall have examined and considered the record and assignment of errors, and is satisfied that there is error in the same, or that it presents a point proper for the consideration of the supreme court of appeals." W. Va. Const. Art. 8, § 6.

Times doctrine was intended to foster and protect. Here a newspaper criticized a public official seeking re-election, on the grounds that he had abused the influence of his position to further his private convenience and also because while in office he had actively and aggressively opposed local measures which the editor thought vital to the public health of the community.

The objection of the official in this case was that he felt he "was being severely criticized and . . . did not appreciate that as an office holder." (Tr. 58-59.) In looking for a way "to prevent any further such editorials" (Tr. 59), he struck on the libel laws. The use of the libel laws by public officials to silence editorial critics is plainly unconstitutional under the decisions of this Court. Petitioner was deprived of its constitutional rights simply because the *New York Times* doctrine was ignored by the trial court and the Supreme Court of West Virginia.

I. The Absence of Evidence of Actual Malice

Respondent offered *no evidence* that petitioner acted with "actual malice," that is, a knowing resort to falsehood or a total disregard for the probable falsity of the material published. Despite petitioner's objections, the case was actually tried by respondent, given to the jury, and decided as if it were an ordinary libel suit against a private individual, contrary to the repeated rulings of this Court in cases involving criticism of a public official.

In permitting this case to go to the jury, the trial court indicated that even the mildest editorial criticism, such as the sarcastic references to the methods used by respondent in campaigning for office, is subject to the penalty of libel. The rough-and-tumble

political campaigns envisaged by this Court in *New York Times*—involving "[c]harges of gross incompetence, disregard of the public interest, communist sympathies . . .," 376 U.S. at 273, n. 14—dramatically illustrate how far *within* the limitations of constitutionally-protected political disclosure petitioner's editorials were.

This Court in *New York Times* narrowly defined "actual malice." Subsequent decisions have refined it still further. In *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964), this Court held that in order to constitute actual malice in defamation of a public official, there must be affirmative proof that that defendant was guilty of a "calculated falsehood" or that he had a high degree of awareness of probable falsity. And in *Henry* v. *Collins*, 380 U.S. 356, 357 (1965), this Court held that a speaker must have "*intent to inflict* harm through falsehood."

The latest opinion on this issue by this Court is *Curtis Publishing Co.* v. *Butts*, 87 S. Ct. 1975 (1967). In that case, Justice Harlan, speaking for four justices, recognized that the requirement of malice might be less in a case where the plaintiff is a prominent public figure rather than a public official. In the former case, there might be a duty to make a reasonable investigation of the truth of the statement made. But in the case of a public official, as Justice Harlan's opinion, 87 S. Ct. at 1990-91, emphatically reiterated, the rule in *Garrison* limits recovery

> "to those cases where 'calculated falsehood' placed the publisher 'at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.' Garrison v. State of Louisiana, 379 U.S. 64, 75, 85 S. Ct. 209, 216, 13 L.Ed. 2d 125.

> That is to say, such officials were permitted to recover in libel only when they could prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity. Investigatory failures alone were held insufficient to satisfy this standard. See New York Times, 376 U.S., at 286-288, 292, 84 S. Ct. at 729-730, 732; Garrison v. State of Louisiana, supra, at 73-75, 79, 85 S. Ct. at 215-216, 218."

The Chief Justice differed with Justice Harlan only on the question of whether public officials and public figures should be treated differently. The dissenting opinions in *Curtis* would unquestionably require a reversal of the verdict in this case.

Although there is no opinion by the state court in this case, this Court has held that where the first amendment right to comment on the activities of public officials is involved, it will read the record and review the evidence. As Justice Brennan said in *New York Times* v. *Sullivan*:

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' Speiser v. Randall, 357 U.S. 513, 525, 2 L.Ed. 2d 1460, 1472, 78 S. Ct. 1332. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' Pennekamp v. Florida, 328 U.S. 331,

335, 90 L.Ed. 1295, 1297, 66 S. Ct. 1029; see also One, Inc. v. Olesen, 355 U.S. 371, 2 L.Ed. 2d 352, 78 S. Ct. 364; Sunshine Book Co. v. Summerfield, 355 U.S. 372, 2 L.Ed. 2d 352, 78 S. Ct. 365. We must 'make an independent examination of the whole record,' Edwards v. South Carolina, 372 U.S. 229, 235, 9 L.Ed. 2d 697, 702, 83 S. Ct. 680, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." 376 U.S. at 285.

Chief Justice Warren, concurring in *Curtis Publishing Co.* v. *Butts*, 87 S. Ct. 1975, 1998 (1967), reiterated that principle:

> "We must review the evidence to ascertain whether the judgment can stand consistently with those principles. New York Times v. Sullivan, 376 U.S. 254, 285, 84 S. Ct. 710, 728 (1964); Speiser v. Randall, 357 U.S. 513, 525, 78 S. Ct. 1332, 1341, 2 L.Ed. 2d 1460 (1958)."

That this case squarely fits into the category of cases in which this Court must review the record cannot be questioned. The record shows an unconstitutional limitation placed upon petitioner's rights under the first and fourteenth amendments, a limitation which will operate as a continuing bar to free debate on the activities of public officials in West Virginia until the judgment for respondent is reversed by this Court.

II. The Erroneous Charge to the Jury

The charge to the jury was unquestionably erroneous on the most critical issue—the definition of "actual malice." This Court has recognized its obligation to scrutinize jury charges to insure implementation of the *New York Times* doctrine.[9] The trial court charged

[9] *Henry* v. *Collins*, 380 U.S. 356 (1965); *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967).

the jury that it could return a verdict for respondent if it found that the statements complained of were published with malice. It stated, over petitioner's objection, that "malice means that the publisher knew them to be false or used them with reckless disregard of whether they were true or false, *or used them with bad or corrupt motive.*" [Emphasis supplied.] (Tr. 133.) In further elaboration, the court defined malice as encompassing statements published "with hatred, or revenge, or from personal spite, ill will or a desire to injure plaintiff." (*Ibid.*) This instruction is flatly inconsistent with this Court's decisions. It would permit recovery by a public official for the publication of material which the publisher reasonably thought was true if the jury believed that the publisher entertained ill will against the official.

This Court's decision in *Rosenblatt* v. *Baer*, 383 U.S. 75, 84 (1966) considered and squarely rejected an instruction essentially the same as the instruction given in this case. There the plaintiff had been awarded a jury verdict in a libel case tried before the *New York Times* decision. In reversing, the Court held that instructions by the lower court which defined malice to include "ill will, evil motive, intention to injure . . ." were "constitutionally insufficient where discussion of public affairs is concerned."

The policy behind this Court's narrow definition of "actual malice," a definition which excludes ill will or hatred, was elaborated in *Garrison* v. *Louisiana*:

> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like

> the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, 'it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded.' Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875, 893 (1949). Moreover, '[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives.' *Id.* at 893, n. 90." 379 U.S. at 73-74.

The trial court's charge to the jury is patently inconsistent with this Court's decisions. This gross error, together with the Supreme Court of West Virginia's refusal even to hear the case, consitutes a total repudiation of the *New York Times* and *Garrison* decisions.

If the verdict in this case is permitted to stand, petitioner's newspaper can no longer engage in the frank appraisal of the qualifications of candidates for local office in West Virginia through the publication of honest editorial opinion. This is dramatized by the fact that after judgment was rendered in this case, another suit was filed against petitioner's newspaper based on similar honest criticism of the mayor of Beckley. The damages sought in that case are $75,000. A copy of the complaint in that suit is attached.[10]

This Court has stated:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice

[10] See Appendix B, p. 18a. Indeed, a reading of that complaint shows that the editorials made the subject of libel are far less invidious in their criticism of the mayor than in any of the cases where criticism of a public official has been held immune from libel by this Court.

to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *New York Times* v. *Sullivan*, 376 U.S. at 278.

Petitioner is a small newspaper corporation with limited financial resources. As a result of the precedent set by this case, petitioner cannot engage even in mild criticism of the public officials of its county without the constant fear of other libel suits in addition to the case recently filed. Petitioner simply cannot afford under these circumstances to make independent comments on the qualifications of candidates for office and public officials. Unless this case is reversed, respondent will have succeeded in his stated objective: "to prevent any further such editorials." (Tr. 59.)

CONCLUSION

For the reasons set forth herein, this Petition for a Writ of Certiorari should be granted. Petitioner respectfully urges this Court to reverse summarily the judgment of the Circuit Court of Wyoming County concurrently with its issuing the Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

(Record, pp. 63-64.)

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

Civil Action No. 16061

C. HAROLD HANKS, *Plaintiff*,

v.

BECKLEY NEWSPAPER CORPORATION, a corporation, *Defendant*.

ORDER

On the 31st day of May, 1966, came the plaintiff in person and by his attorney, and came also the Beckley Newspaper Corporation, by its Agents and attorneys, and issues having been joined each party announced ready for trial.

Whereupon, the plaintiff moved the Court to amend the pre-trial Order by striking out an issue based upon a statutory cause of action, to which no objection being made, the said Order was so amended.

Then came a jury consisting of D. B. Easter and eleven other good and lawful persons, chosen and empaneled and sworn according to law before whom the plaintiff introduced testimony and then rested his case. The defendant moved the Court to strike out plaintiff' [sic] evidence and direct a verdict for the defendant, which motion was overruled and to which the defendant excepted. The defendant thereupon introduced evidence in its behalf before the said jury and rested its case and the plaintiff again rested. And the trial not being final was recessed until the 1st day of June, 1966.

Now on this 1st day of June, 1966, the parties by their respective agents and counsel came again, and the Court instructed the jury, upon the law and its application to the case and the case was argued by counsel and the jury

having retired to consider its verdict, after a while returned into the Court the following verdict:

"We the jury find in favor of the Plaintiff, C. Harold Hanks, in the amount of $5,000.00.

Signed:
Foreman
D. B. Easter".

And the jury was discharged from the case.

It is, therefore, the judgment of this Court and it is so ordered that the plaintiff, C. Harold Hanks, shall recover of and from the defendant, Beckley Newspaper Corporation, a corporation, the sum of Five Thousand Dollars ($5,000.00) with interest thereon from the date of verdict until paid or otherwise disposed of, and his costs in his behalf expended including a taxed attorney fee in the amount of $10.00; to all of which the defendant doth except.

Enter:

s/ Robert M. Worrell
Judge

Entered in Civil Order Book No. 5 at page 380 this 25th day of June, 1966.

s/ John S. Lambert
Clerk

APPENDIX B

(Record. p. 234.)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 8th day of May, 1967, the following order was made and entered, to-wit:

C. HAROLD HANKS

v.

BECKLEY NEWSPAPERS CORPORATION, a corporation

On a former day, to-wit, March 15, 1967, came again the petitioner, Beckley Newspaper Corporation, a corporation, by Mann, Lynch and Mann and Jack A. Mann, its attorneys, and presented to the Court its first, second and third petitions praying for an appeal from and supersedeas to a judgment of the Circuit Court of Wyoming County rendered in this action on the 16th day of July, 1966, overruling defendant's motion to set aside the verdict and judgment rendered on the 25th day of June, 1966, with the record therein accompanying the petitions, and notes of argument in support thereof, which being seen and inspected the appeal and supersedeas prayed for is refused by a majority of the Court on this third application. Judges Calhoun and Berry would grant.

A True Copy

Attest:

s/ KENNETH E. HINES
Clerk Supreme Court of Appeals

Entered in Civil Order Book No. 6 at page 228 this 12th day of May, 1967.

s/ JOHN S. LAMBERT
Clerk

APPENDIX C

The three editorials on which respondent based his libel action are as follows (Tr. 34-44):

1. *Beckley Post-Herald*, January 16, 1962.

HANKS WILL COME TO SEE YOU EVERY SIX YEARS!

A dispatch in the Sunday Post-Herald and Raleigh Register quoted C. Harold Hanks to the effect that he planned to resole his shoes in preparation for a door-to-door campaign in hopes of being renominated as circuit clerk.

We didn't think that this was going to be necessary; we understood that Clerk Hanks had managed to get the state to pave a virtually private road to his doorway.

We were had to believe that he could get out by automotive power now and wouldn't have to go on foot.

However, Clerk Hanks, who lives outside the city, but mounted a frenzied and compulsive campaign to prevent fluoridation of the city water supply, which has thus far been successful in preserving the right—God-given, according to Hanks—of kids' teeth to decay undisturbed by science, thinks the shoe bit is the gimmick that will elect him.

The story we saw didn't give any indication of who will "keep store" in Hank's absence. Maybe he will not really be missed at the courthouse when he is out trying to reach "every voter in the county."

But really we have some feeling that since he was elected to the circuit clerk job, he really ought to put in some time at the clerk's office instead of gumshoeing around the county, pawing the unwary citizens.

If the clerk could do this job on his own time, we would be relatively indifferent. But we don't feel that the citizens ought to have to pay him for campaigning as they probably

did before when he was supposed to be managing the airport.

And speaking more personally, we won't mind at all if he spares us the worn-out brogan and grubby paw act! We weren't impressed the last time around. And repetition doesn't lend enchantment. Distance does, Mr. Clerk.

2. *Beckley Post-Herald,* September 4, 1962.

THE FLUORIDATION SITUATION REMAINS UNCHANGED

About the middle of last month we wrote here at some length about the situation in regard to Beckley's water supply and the failure of thousands of Raleigh County children to gain the considerable benefits of fluoridation.

Admittedly, we romped pretty heavily upon Circuit Clerk Harold Hanks and Mrs. Elinor Hurt, president of the Raleigh County Board of Health. We thought it was something they deserved. We still do.

We did not hear anything directly from either of the two denizens of the Raleigh County Courthouse. But indirectly we got the word of their displeasure. One way or another, word of this sort of thing always gets around.

If our understanding of Mrs. Hurt's position is correct, she is "not against fluoridation" at all. But she will give forth a lot of the foolish arguments against it which have been disproved. And apparently she will not lift a finger in her official position on the Board of Health to do anything in behalf of the numerous children of this area who face future lives with a certainty of poorer dental health than would have been necessary. She hasn't for more than two years insofar as we have been able to learn.

We were also informed—indirectly, of course—that Mrs. Hurt does not consider herself a political power in the county. She apparently would have us believe that she has

no influence with either elected officials or the Democratic Party organizations.

Just why she is always in the middle of the county's political affairs, if this is the case, is something of a mystery to us. People who have no political influence and are not seeking such are rarely found occupying the positions which Mrs. Hurt holds, either in the employ of the Raleigh County Court, or in the numerous other functions of the body politic in this county.

IF IT IS TRUE that Mrs. Hurt does not dabble in politics, why on earth is she always so reluctant to make information available to the general public through the various news media? She is secretary or otherwise involved in the business of the County Court, the County Park Board, the County Board of Health, the County Democratic Executive Committee, and is a deputy county clerk.

She pleads that she is not a political power, and that because she receives no pay for some of these jobs she should not be subject to criticism concerning them.

Here, again, she seems to want to follow in the footsteps of Hanks. For it was Hanks who ordered over the telephone once that he did not want his name to appear in the Beckley Post-Herald again. He backed up this order with an inexplicit threat—one merely intended to frighten those who are easily intimidated.

The only conclusion to which we can come is that either Hanks and Mrs. Hurt have been in league toward the fanatic end, believing all the wild-eyed ravings against fluoridation despite decades of experience to disprove them, or that perhaps his blustering threats were able to intimidate the lady.

Frankly, we have admired Mrs. Hurt for many things in the past and still do in some respects. We doubt that she could be intimidated easily, even by Hanks.

As long as the situation now extant remains so, we can only retain the same opinion we expressed earlier that these politicians have successfully withheld the hygenic measure which fluoridation is from our children for years, "that Mrs. Hurt is not properly concerned with the health of this county and should not be allowed to head, or even serve upon, the Raleigh County Board of Health." Her concerns are too completely political for the good of the county's health.

And again, "if the voters are intelligent, they will oust Hanks without ceremony in November."

3. *Beckley Post-Herald,* November 5, 1962.

AS WE SEE THE MEN, ISSUES TO BE DECIDED

Though the Beckley Post-Herald is a Republican newspaper and believes firmly that the principles of the Republican Party offer far greater certainty of the continuing freedom and strength of our nation, it does not believe that voters should go strictly by party affiliation in deciding how to mark their ballots.

Rather, the voters' own best interests dictate that they should always vote for the man they believe best suited to the office concerned regardless of his (or her) political affiliation. When all things are deemed equal between candidates, then party principles should prevail, perhaps, but such situations are infrequent.

The Post-Harold urges its readers who may be in doubt to vote for M. G. (Mal) Guthrie as Third District congressman and Cooper Benedict as Second District representative both because it seems abundantly clear that they are better men than the incumbents and because 30 years of almost solidly Democratic rule in West Virginia have brought the state to the brink of disaster with ever-higher taxes at both state and federal levels and ever-lower population figures and economic circumstances. Both congressional candidates

are firmly pledged toward a reversal of the unwise policies which have led the Mountain State into such straitened circumstances.

In actuality our difficulties also stem from one of the nation's poorest congresswomen, Mrs. Elizabeth Kee. But we have come to feel that the Fifth District really deserves the representation it has. Fayette County, which is new to the district, also pretty well deserves the likes of Mrs. Kee. It has blindly voted for Cleveland Bailey and his brand of socialism in the past and is largely responsible for having kept him in the old Third District seat.

If state voters elect Fred H. Caplan, the governor's appointee, to the State Supreme Court they will be supporting the hand-picking of men instead of their election. They will also be selecting the least experienced man—a man of much less experience than the other four judges now serving.

Judge Max DeBerry of the Third Circuit is a great deal more qualified. In addition there is no valid reason why one of the five judges on the state's highest court should not be a representative for the minority party of about forty per cent of the state's people.

WE ARE OFFERING NO recommendations in regard to the State Senate seat or the county's criminal judgeship.

G. C. Porter, the Senate incumbent by appointment, has done nothing except follow his party line and has been disappointing. He has been a better city councilman here, and Raleigh County Democrats voted against him in the primary.

On the other hand, O. A. Phillips of Sophia has hardly lifted a hand to let anyone know where he stands. He failed to attend his own party's county rally last week.

MINOR L. SCOTT of Table Rock is an outstanding candidate for the county court post. He has done notably good jobs for the county previously, both in four years of road

building and maintenance work which topped any before or since and in agriculture work.

Hundreds of Democrats have hailed Scott's prior performance and his present candidacy. Many of them agree that it is time for the minority party to be represented on the Raleigh County Court once again, believing it would have a beneficial effect on the other majority party office holders.

C. O. Smith Jr. has done an outstanding job as county clerk for six years. He has left foolish partisanship out of the county's business affairs and has delivered sensible administration of his office's affairs. He deserves re-election!

We cannot make any real case for Emery E. James of Cirtsville to be a topnotch circuit clerk, but the incumbent, C. Harold Hanks, makes him look good nevertheless. Hanks has made it clear that he cares not at all about our children in delaying needed fluoridation of the local water supply by two years or more. He has also been reported as saying he would fight it further after the election.

Hanks is really a rather unsavory character.

UNFORTUNATELY, there is not one good ticket for the House of Delegates in both parties' candidates.

Perry Clay Price and T. R. Wilson have made it clear they want to see some real beneficial reforms for West Virginia. This appears also to be true for Mrs. W. W. Withrow. We urge the election of these three. If there is a choice to be made among the other three, we would have to give the nod to C. Berkley Lilly.

Mrs. Withrow started out poorly, refusing to be interviewed and to state her position. This seems to have changed. She now makes herself much clearer on her position, and though we do not always agree with her, we feel

she is proving a good representative of Raleigh County. It is also well for Sophia to have one of the four.

We have been sadly disappointed by David Abrams. We considered him promising but he has turned out to be a party-liner, easily to be controlled by the political bosses, it appears. Dale Covey is the least of the six contenders, apparently anxious to change laws governing school board members.

ALL LAST WEEK we outlined our positions on the five constitutional amendment proposals. We favor those on Alcoholic Liquor Control and the State Executive and Budget. We oppose those on Sheriffs' Succession, (un)Fair Representation, and the Legislative.

We find the West Virginia League of Women Voters agrees with us in regard to the two on which they have taken a stand. They are for the State Executive and Budget Amendment and against the (un)Fair Representation. We are happy to have such good company.

Most of all, we urge that you vote! Vote for the men you think will be best in the offices to be filled.

APPENDIX D

The two editorials introduced by respondent for the purpose of showing that petitioner acted with malice are as follows (Tr. 23-32):

1. *Beckley Post-Herald,* November 3, 1960.

ON HAROLD'S HANKERINGS

The time has surely arrived once again when it is necessary to call a spade just what it is.

Some little time ago as election pressures began to mount, Raleigh County's eccentric circuit clerk, Harold Hanks, seized upon the situation as an opportunity for a bit of personal aggrandizement. He began spouting forth declamations as though he were at least a congressman, if not a senator.

Ever since the puny eruptions began we have, considering the source, felt the oracular brayings unworthy of any special comment.

Now, however, the distortions and twistings of the truth by Hanks have reached the point where it seems proper that the facts should be presented to the public, lest it be greatly misled.

Hanks is a Democrat who pretends that he was somewhat sympathetic with the Republican-administered State Road Commission until it failed to drop everything it was doing in order to build what almost amounts to a private driveway for him.

We would point out that when what is obviously a matter of personal gain tends to interfere in important public affairs, the Post-Herald has not hesitated to call it such even when Republicans were chiefly involved. We did this in regard to the threat of a local hullaballoo over the selection of a new post office site for Beckley which conceivably would have cost the city a new post office for perhaps years.

Harold Hanks lives on what is now known as W. Va. Secondary Route 6/3, a few hundred feet off of the primary highway, Route 3 or Harper Road. It is our understanding that he constructed his home in 1958.

Assuming he has normal intelligence, he knew quite well what the situation was in regard to road construction and funds for the same from our Legislature, controlled by his party. He should have known that hundreds—indeed, thousands—of Raleigh Countians have had homes located for the 35 years since road paving began in this area on narrow, unimproved roads and still have little hope of getting really good roads in the immediate future.

Apparently Hanks thought that just because he happens to be a clerk of the circuit court, he could obtain expensive road improvements rather quickly, for, by his own claim, he began agitating for such improvements in November of 1965 [sic].

IN HIS STATEMENTS, he has claimed that he was promised something but has been unable to show promises of anything other than consideration of his problem. He has made it obvious that he received a good bit of attention from SRC personnel and about a year of polite and civil response to his insistent demands.

He has also claimed that the road which serves him has received no attention or work. In actuality, SRC records show that it has been worked upon five times since the first of this year. Two times it was for snow and ice removal, twice red-dog applications were made (once near his home in direct response to his personal request), and a fifth time to cut brush on the right-of-way.

In the latter connection, Hanks' vengeful political posters show the road as if it were virtually closed by overhanging brush. The picture almost had to have been taken prior to last June when the SRC records show that the brush was

cut on the narrow road. And this would indicate that he had planned his political attack long before it was launched.

One of the big problems in connection with the road which turns off Harper Road between the old Frank Foote home, now occupied by W. B. Tilley, and the property of Adolph Bair opposite the Hulett Smith estate is that of the right-of-way.

The county's SRC supervisor, Minor Scott, admitted by Hanks to have been "fair and honest with me," says that the first need for improving the road is widening. But this represents a real problem and could entail a court suit or suits.

J. A. Haws, district SRC engineer at Princeton, says it is part of the Old Logan Turnpike, one of the two oldest roads in the county. By ruling of the State Supreme Court on roads established prior to 1935, this means it should have a 30-foot right-of-way, running 15 feet each way from the center. But, Haws says, it "has been encroached upon and encroached upon until there's almost nothing left." To substantiate this statement, the SRC has received a letter from Herbert Stansbury, a Beckley lawyer representing Adolph Bair, indicating that his client will resist any idea that the land he occupies up to the edge of the narrow roadway belongs within the Old Logan Turnpike right-of-way.

On the other side of the road, the Tilley home is fairly close to the road and a garage building sets largely within 15 feet of the center of the road. A 30-foot right-of-way would even take some of what Hanks no doubt considers his property.

Behind the two corner properties there are only four occupied homes and one trailer home which use the road. Though it goes on through to the Maxwell Hill community, all but one of the homes beyond the West Virginia Turnpike use the Maxwell Hill Road for access. Though the Turnpike Commission has a maintenance building along the road, it can also be reached via the Turnpike itself, and the commis-

sion has shown no interest in improvement of the Hanks access road.

While only two-tenths of a mile from Route 3 to the maintenance garage are involved, it could prove quite expensive (just in court costs, perhaps) to gain the needed right-of-way and would set a precedent for little-used secondary roads if property was purchased.

Still and all, Hanks thinks his road, serving four or five families is more important than such as the Tommys Creek, Richmond District or Old Crow roads that serve dozens if not hundreds of families many of which are miles from good primary roads instead of a few hundred feet.

As we indicated above, this seems to us to indicate an outsize sense of personal importance which is not well rooted in reality.

2. *Beckley Post-Herald*, June 20, 1961.

HANKS ASKED FOR IT

We were a bit amazed on Sunday to receive a telephone call, from a man who should know better, which was not only threatening but proposed to dictate to the newspapers what they might and might not write about in regard to editorial criticism.

It just so happens that this man, C. Harold Hanks, holds a high county office—that of circuit clerk. If his experience in his post has taught him anything, he should know that threats of bodily harm are looked upon rather dimly by the law.

He should also know that anyone who aspires to, or holds, public office is, by ruling of our courts, subject to searching scrutiny and criticism in regard to all his actions. When a man asks or receives public trust, he cannot expect to gain any sort of immunity to public criticism, not even for the asking.

Hanks' background is such that a newcomer to this community might have difficulty in understanding the present situation.

He held public office by appointment from the county commissioners when he became manager of the Raleigh County Memorial Airport. Then he decided to run for the office of circuit clerk. It is our understanding that he went from door to door to talk with large numbers of the voters —perhaps a majority of them—to solicit their votes. We do not recall at the moment whether he resigned his airport managership in order to do this or not.

In any event, he was elected. Insofar as we know, he has done a reasonably good job as clerk of our courts. Normally, this would be the end of such a story.

IN HAROLD HANKS' CASE, however, this is not all by any means. Since his election to the clerkship, he has twice used his office to enter into highly controversial actions and, apparently, to try to influence other high officials to do his bidding.

The first had to do with the fluoridation of the Beckley water supply, which has also become the water supply for perhaps more than half of Raleigh County, and at least a small part of Fayette County. Hanks now tries to claim that he was only a small cog in the wheel of opposition to fluoridation. Yet, he was by far the most influential opponent to inveigh against it—partially by virtue of the office to which he had been elected—and he was certainly the man who spoke at greatest length in a public hearing on the matter.

Now, he appears to want to forget this fact and demands that everyone else forget it, too, or at least make no public reference to the fact.

He also seems more interested in settling the issue by offering to meet an editor for fisticuffs in the middle of a

vacant parking lot at night than by any reference to scientific facts of the matter. As we see it, whether he or an editor can best the other in a brawl has little to do with either good health or good government for Raleigh Countians.

The facts still remain that all major West Virginia cities except Beckley have fluoridation of their water supplies for the benefit of their children—and Beckley is supposed to be a major medical center!—and more than half the nation's people are likewise improving their water supplies and their people's dental health.

In discussing the fluoridation issue, Hanks appears to admit that the treatment is good for children's teeth. The fact is that it helps adults' teeth too, but to a lesser degree. He still clings to an idea that fluoride is a health menace to older people—stating that it affects their kidneys adversely. The doctors who have studied the matter say that this is just another red herring from the fanatical cult which has grown up to oppose fluoridation. It still has never been proved to have ANY adverse affects on humans of any age, while its benefits are well proven. We have this on the authority of the UMW area medical administrator, Dr. Deane F. Brooke, and numerous other authorities.

THE PERSONAL DESIRE for road-paving was the next point at which Hanks intruded himself into public controversy. He lives a short distance from a primary highway and decided that his access road should be paved regardless of any and all other considerations. Though he was not otherwise concerned personally in the election last year, he entered into the campaign by threatening the incumbent administration with his strongest possible political opposition if his road was not paved. The threat was ignored and he carried it out. Apparently, for his help in the campaign, he has now, we understand, gotten the road improved right up to his house.

This certainly smacks of misuse, for personal gain, of the influence of his public office. When he received his place on

the public payroll, he should have realized that he had forfeited any right to special consideration in such things. Instead, his attitude seems to be that he won the right to special consideration in all things."

He indicates this to the extent that he believes by making a threatening telephone call, he can withdraw the right of free criticism of his actions as a public official. In actuality, it was this action which made this added comment a necessity and a certainty.

No newspaper can permit its editorial voice to be stilled or affected so. It cannot even permit such an impression to be gained by a public official—or a private individual.

APPENDIX E

The following complaint was filed by the mayor of Beckley against petitioner, claiming $75,000 in damages for an alleged libel:

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

Civil Action No.

JOHN WESLEY SMITH, *Plaintiff*

v.

BECKLEY NEWSPAPERS CORPORATION, A CORPORATION, *Defendant*

COMPLAINT FOR LIBEL

(1) The plaintiff, John Wesley Smith, is now and has always been a good, true, moral, honest, upright and worthy person and citizen of West Virginia and is now a resident of Raleigh County, West Virginia, and presently is and was during two years or more preceding the institution of this action, the Mayor of the City of Beckley, Raleigh County, West Virginia. Until the committing of the several grievances and injuries hereinafter mentioned, plaintiff was always reputed, esteemed and accepted by and among his neighbors and the good and worthy citizens of this State and especially of Wyoming, Raleigh, Fayette, Summers and Mercer Counties to be a person of good character, name, fame and credit; physically clean, honest, sober and of good morals and conduct; and law-abiding in act, deed and attitude.

(2) The defendant, Beckley Newspapers Corporation, is a corporation, whose principal office is located at Beckley, West Virginia, now and during the past two years, engaged in the business of publishing two daily newspapers, namely, "The Beckley Post-Herald" and "The Raleigh Register,"

which are widely distributed and generally published, circulated and read in the vicinity of, and area and counties surrounding Beckley, including Wyoming County, West Virginia, where said newspapers have an extensive, general, daily publication and circulation. The Sunday edition of said newspapers is a combined newspaper known as the "Beckley Post Herald" and the "Raleigh Register," and likewise was generally published and widely distributed, circulated and read in the City of Beckley, in all places in said Raleigh County and in other counties surrounding said Raleigh County, including the county of Wyoming.

(3) For more than two years immediately preceding the institution of this suit, and particularly during the past two years, the defendant then and there maliciously intending to injure the plaintiff in his good name, fame and morals, and to bring him into public scandal, disgrace, infamy, hatred, scorn, ridicule and contempt, with and among his neighbors and other members of the public in his home city of Beckley, and his home county of Raleigh and the county of Wyoming and other counties adjacent thereto where said newspapers were published, distributed and circulated and to vex, embarrass, humiliate, harass and oppress him, at various times did falsely, recklessly and maliciously compose, print, publish and circulate in said newspapers owned, controlled, managed, published and distributed by said Beckley Newspapers Corporation, false, scandalous, untrue, malicious and defamatory libels of the plaintiff as to his morals, honesty, his sobriety, his integrity, his character, his birth, his personal cleanliness and the propriety of his actions, and his conduct as a public officer and official, contending, among other things, the false, untrue, scandalous, malicious, defamatory and libelous matter of and concerning the plaintiff as set forth in paragraphs (3a), (3b), (3c), (3d) and (3e) hereof.

(3a) In the issue of the "Raleigh Register" of February 18, 1966, said defendant, in a column entitled "Ring Regis-

ter" composed, printed, published and circulated the following of and concerning the plaintiff:

"Q: Ask Mayor Smith about the steel in his yard. Is it part of the steel from the parking building? Did the City pay for it? Where's a bill of sale?

"A: The Mayor is adding a double carport, a bath and a recreation room to his home at 905 Woodlawn Ave. Estimated cost, according to City Building Permit records, is $7,000.

"He said the bills of sale are being kept on file, that the steel being used is not from the Parking Building allotment, that the City did not pay for it, and that he considers further questions an invasion of his privacy."

By means of the said false, untrue, malicious and defamatory statements by the defendant, the plaintiff has been and is greatly injured in his good name, fame and credit and brought into public scandal, infamy and disgrace with and among all of his neighbors and other good and worthy citizens of the aforesaid counties where the said newspaper is published and is circulated, and defendant hath greatly injured him, his fame, credit, character and reputation as a public officer, namely Mayor of the said City of Beckley, Raleigh County, West Virginia, insomuch that diverse of those neighbors and citizens to whom the good character of the plaintiff in the premises were unknown, have, on account of the committing of said grievance by the defendant, from thence hitherto suspected and believed, and still do suspect and believe the plaintiff to have been, and to be, a faithless and dishonest public servant who uses his official position and public office for personal gain and profit, and to have been and to be engaged in unlawful or illegal conduct and/or in violation of the law, and that he had illegally, unlawfully and improperly acquired or taken steel from the City for his personal use.

(3b) In the issue of the "Raleigh Register" of January 4, 1967, said defendant again said of and concerning the plaintiff:

"It would be nice to have a mayor who had risen above petty politics, who had the courage to decline to be a party to the conspiracy against the liquor laws, who was a man of such integrity that the office would seek him rather than the other way around.

"It would be nice to have a mayor who would answer the public's questions about his activities (the steel for his house addition, remember, which he declined to discuss).

"...

"...

"It is useful to the present breed of politician most of whom have the integrity of the chameleon, little or no character, but merely seek by whatever means to be anointed by the party, and an unthinking electorate, which cares little about the kind of government it gets."

By means of the said false, malicious and defamatory statements by the defendant, the plaintiff hath been and is greatly injured in his good name, fame and credit, and brought into public scandal, infamy and disgrace with and among his neighbors and other good and worthy citizens of the aforesaid counties where said newspaper is published and is circulated, insomuch that diverse of those neighbors and citizens to whom the good character of the plaintiff in the premises were unknown, have, on account of defendant's said acts, from thence hitherto suspected and believed and do suspect and believe the plaintiff to have been and to be engaged or participating in illegal and unlawful conduct and who had been a party to a conspiracy to violation of the law, and again that he had stolen, taken or otherwise illegally and unlawfully acquired steel for his home or yard

from the City. And he hath been and is much injured and damnified.

(3c) In the issue of the "Raleigh Register" of January 13, 1967, said defendant impliedly said of and concerning the plaintiff in discussing the city administration of which the plaintiff was the chief executive officer:

> "Who knows, maybe honesty is the best policy. Wouldn't it be nice if the City would try it as a small experiment?"

By the means of the committing of which said grievance by the said defendant as aforesaid, the said plaintiff has been and is greatly injured in his good name, fame and credit, and brought into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy citizens of the aforesaid counties and State, insomuch that diverse of those neighbors and citizens to whom the good character of the plaintiff in the premises were unknown, have, on account of the committing of said grievance by the defendant, as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the plaintiff to have been and to be dishonest.

(3d) In the issue of the "Beckley Post-Herald" of February 9, 1967, in discussing the city administration headed by the plaintiff as chief executive officer, said defendant expressly or impliedly said of and concerning the plaintiff:

> "Whatever the present city administration may have done, it has not fulfilled its first and basic responsibility toward the citizenry to operate openly and honestly in the interests of all the people of Beckley. Rather, it has played 'footsie' with various special interests and has meted out favors to its friends and petty punishment to those who have not played the game its way.
>
> "The past four years have proved to be an ignoble experiment in government by indirection from the

Statehouse in Charleston. Never before has Beckley permitted its city budget and city affairs to be manipulated for the benefit of the statehouse machine. And each passing day shows more and more how much this outside manipulation can hurt a city and cut down its potential!

"There has been a singular lack of intelligence at city hall for the past four years. . . ."

By the means of the committing of which said grievance by the said defendant as aforesaid, the said plaintiff has been and is greatly injured in his good name, fame and credit, and brought into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy citizens of the aforesaid counties and State, insomuch that diverse of those neighbors and citizens to whom the good character of the plaintiff in the premises were unknown, have, on account of the committing of said grievance by the defendant, as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the plaintiff to have been and to be dishonest, irresponsible, guilty of unlawful conduct, unintelligent and to have been a faithless and dishonest public servant who has used his official position in public office for personal gain and profit, and for profit to his friends, and to have unlawfully and illegally, through his official position, inflicted unlawful punishment on others, all to the great injury and damage of the plaintiff.

(3e) In the issue of the "Post-Herald" of May 22, 1967, said defendant again said of and concerning the plaintiff:

"This is the type of operation the John Smith administration has been noted for during the past four years. There can be no credibility on the part of the public because there is a wide gap between obvious facts and official lies.

". . .

"There is as likely to be a lie as the truth told here when one seeks information from the city. There has been a colossal waste of taxpayers' moneys. And partisan machine politics and personal gain have been riddled throughout the operation of the city since July 1, 1963."

By means of the said false, untrue, malicious and defamatory statements by the defendant, the plaintiff has been and is greatly injured in his good name, fame and credit and brought into public scandal, infamy and disgrace with and among all of his neighbors and other good and worthy citizens of the aforesaid counties where the said newspaper is published and is circulated, and defendant hath greatly injured him, his fame, credit, character and reputation as a public officer, namely Mayor of the said City of Beckley, Raleigh County, West Virginia, insomuch that diverse of those neighbors and citizens to whom the good character of the plaintiff in the premises were unknown, have, on account of the committing of said grievance by the defendant, from thence hitherto suspected and believed, and still do suspect and believe the plaintiff to have been, and to be, a faithless and dishonest public servant who uses his official position and public office for personal gain and profit; that the plaintiff was unfit for office because he was dishonestly engaging in untruths and was not credible in his official capacity, and because he used his official position for personal gain and profit and thereby being engaged in illegal and improper activity and a crime.

(4) That the defendant, by said communications, said malicious, false, scandalous, untrue, defamatory and libelous communications, publications and matters of and concerning the plaintiff hereinbefore set forth, maliciously meant and was understood to mean by persons to whom said written communications, matters and publications were made, amongst other things, as follows: that plaintiff, as a public officer, had knowingly violated the constitution and

laws of the State of West Virginia in illegally using public funds and the position of his public office to benefit persons, departments or parties not entitled thereto, and for personal gain and profit; that plaintiff, as a public officer, had appropriated to his own use and embezzled public properties and thus was guilty of and had committed a felony and a crime under the laws of the State of West Virginia; that the plaintiff had been guilty of a want of integrity in the conduct of his official position as Mayor of Beckley; that plaintiff, as a public officer, had used his official position to be a conspiracy to violate the laws of the State of West Virginia [sic] and thus guilty of a crime; that the plaintiff was unfit for office because of being dishonest, unworthy, of low character and faithless in the performance of the duties thereof; that the plaintiff, in his official position, has not operated honestly, and has used the same to inflict undue and unlawful punishment upon certain persons while failing to perform the duties of his office or require those under his control to perform the duties of their office with regard to all persons; that the plaintiff, in his public position, has misused or squandered, or caused to be misused or squandered, public funds; that the plaintiff was unfit for office because of his lack of intelligence; and, that by reason of the aforesaid matters and things in this paragraph, and all other paragraphs hereinbefore set out and contained, the plaintiff hath been greatly injured and damnified.

(5) That the said defamatory, scandalous and libelous statements, and each of them, in said publications herein mentioned were not a fair nor a true report of any public or official proceedings or actions and were and are false and were known by the defendant to be false when they were composed, published and circulated, or made with a reckless disregard as to whether they were true or false, and were made by the defendant by and through its duly authorized agents, and employees, with malice and wilful intent to defame and injure the plaintiff in and about his reputation and character, as aforesaid.

WHEREFORE, the plaintiff demands a judgment for compensatory damages against the defendant, Beckley Newspapers Corporation, a corporation, for a sum of Fifty Thousand Dollars ($50,000.00); and the plaintiff further demands judgment against said defendant, Beckley Newspapers Corporation, a corporation, for punitive damages because of the herein alleged wilful, malicious, defamatory and libelous publications and statements by the defendant in the sum of Twenty-five Thousand Dollars ($25,000.00), or a total judgment in the sum of Seventy-five Thousand Dollars ($75,000.00) and costs.

The plaintiff hereby demands a trial by jury of all issues so triable.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 467

BECKLEY NEWSPAPER CORPORATION,
PETITIONER

VS.

C. HAROLD HANKS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION

HARRY G. CAMPER, JR.
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September 16, 1967

Mullens Advocate Print — Mullens, W. Va.

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OPINIONS BELOW

The Circuit Court did not write an opinion or assign any reasons in its final judgment order. The Supreme Court of Appeals of West Virginia denied three petitions seeking an appeal from that order but did not write any opinion or assign any reason for the refusals.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The questions presented in the Petition are adequate to present the issues except that it should be noted that they are grounded upon two incorrect assumptions of fact, one, that there is no evidence in the record of malice "as defined by this Court," and two, that the state court's instruction referred to was substantially different upon the elements of malice from three instructions offered by Petitioner and given by the same court.

CONSTITUTIONAL PROVISIONS INVOLVED

These are stated in the Petition.

STATEMENT

The "Statement of The Case" in the Petition, page 3-10, omits pertinent facts and contains erroneous factual conclusions pertinent hereto.

I - With Reference To The Evidence

Respondent Harold Hanks, is a resident of Raleigh County, West Virginia who was first elected as Circuit Clerk in 1956 for a six year term. He ran for re-election in 1962. (Tr. 12). Beginning in 1960 (when he was not up for re-election) the petitioner's Emile Hodel, editor of the Beckley Post-Herald, who lived in the same general neighborhood as Hanks began a series of attacks upon respondent, some upon him in his public capacity, and some upon him personally.

The Beckley Newspaper Corporation is a Hodel family concern, publishing a morning paper, which is Republican, and an afternoon paper, which is Democratic. Emile Hodel was and is the editor of the morning paper and wrote a personal column as well as editorials. The papers circulate in a multi-county area, the morning paper having a circulation of 20,000. (Tr. 89, 103-105). Although the petitioner is a corporation the offending libel was written entirely by Emile Hodel against his neighbor known to him, and published from

a plant located within two blocks of a county court house, where respondent had his office.

After the 1962 re-election of Hanks, in February 1963, when the West Virginia statute of limitations had run against some of the offending writings of Emile Hodel, and *before* the decision in *New York Times v Sullivan,* 376 U. S. 254, (1964), respondent filed his complaint herein alleging libel of respondent as an individual person and also as a public official. An amended complaint filed two months after the decision in that case added a count based on the West Virginia statute of insulting words. The case was tried May 31, 1966. The issue of insulting words was abandoned and not submitted to the jury. (Tr. 3, 4).

Petitioner's motion for judgment on the pleadings did not assign the ground he urges in his Petition, nor did Petitioner assign such ground for his motion for summary judgment, filed in 1965 (R. 27) nor at trial time (Tr. 9).

Petitioner charges in his Petition (p. 8) the trial record "does not contain a scintilla of evidence that petitioner's editorials were written with actual malice as defined by the Court." Upon the contrary the record provides convincing proof of reckless disregard upon the part of Emile Hodel of the truth or falsity of the offending charges, as well as proof of personal hatred, spite and revengeful motives.

In a small community such as Beckley, West Virginia, there was ample opportunity for Emile Hodel or any officer, reporter, or representative of petitioner to acquire information about any of the libellous charges relied upon to determine truth or falsity thereof. The evidence discloses neither Emile Hodel nor any representative sought any information of respondent (Tr. 56-59) or of Mrs. Hurt (108-109). *Emile Hodel was not called as a witness in behalf of Petitioner, was not in the court room, and no request made for a continuance because of his absence.* Petitioner called as a wit-

ness the general business manager,—not the writer or editor—who admitted the offending editorials were written by Emile Hodel and not checked by anyone else (Tr. 106) and that Petitioner had no witness to any prior investigation of the charges (Tr. 108, 109, 120, 121) that at best they were based upon a "feeling" of "possibility" they might be true. (Tr. 121).

In addition to proof of "malice" within the definition of *New York Times v Sullivan*, 376 U. S. 254—publication of false libellous matter about a public official with disregard of whether or not it was true or false, the evidence also established personal spite, hatred, corrupt motive and desire on the part of Emile Hodel, individually (using petitioner corporation as his cloak and tool) to injure his neighbor, Harold Hanks. Beginning at least in 1960 with an editorial starting on page 1, entitled "On Harold's Hankerings." (Appendix D, Petition, p. 11a), Emile began a campaign of using his newspaper to attack and smear the person of Harold Hanks. He followed with another in 1961 (Appendix D, Petition 14a). The trial court permitted introduction to show the "state of mind" of Emile Hodel when he composed the articles relied upon. (Tr. 28). The subsequent intemperate personal attacks with reference to Hank's person and personal habits reveal the underlying ill-will and manifest intention to injure Hanks personally.

II - With Reference To The Charge To The Jury

Petitioner complains of the giving of Respondent's Plaintiff's Instruction No. 3, Tr. 133-134) with reference to inclusion of the emphasized words:

> "However, even if the words complained of are libellous per se, and are false, before a plaintiff can recover you must believe from the evidence that they were published with malice —and in this case, malice means that the publisher knew them to be false or used them with

reckless disregard of whether they were true or false, *or used them with bad or corrupt motive.*

Applying these principles more clearly to this case, you, the jury, are hereby instructed that the language complained of by the plaintiff, Harold Hanks, is libellous per se; that it was used by the Beckley Newspaper Corporation upon a public occasion in commenting upon matters of public interest and that this was a privileged occasion; that nevertheless the plaintiff, Hanks, is entitled to recover damages from the defendant herein and you should find your verdict for him, if you believe from the evidence that the charges or statements complained of were false and that the publisher at the time knew they were false or published them with reckless disregard of whether they were true or false *or published them with hatred, or revenge, or from personal spite, ill will or a desire to injure plaintiff.* And if you the jury so believe it is no defense that they were published in an election year or in an election campaign or that the plaintiff was a public official.". (Emphasis ours).

Specific objection was not made to the emphasized words by Petitioner's attorneys prior to submission to the jury (Tr. 130-31) in accordance with requirements of *Rule* 51, *West Virginia Rules of Civil Procedure.*

And Petitioner offered the following instructions which were given to the jury as part of the same charge.

"Defendant's Instruction No. 2.

The Court instructs the jury that you cannot return a verdict in favor of the plaintiff, Harold Hanks, unless the plaintiff proves by a preponderance of the evidence (1) that the editorials or material parts thereof were false,

(2) that the defendant, Beckley Newspapers Corporation, knew they were false, (3) that they were published by the Newspaper with actual malice toward the plaintiff. The rule of law requiring the plaintiff to prove all three of these things is not a mere makeshift to be disregarded by you at your pleasure, but it is a substantial and existing part of the law of the land and must be given consideration by you in arriving at your verdict.

The mere fact that this plaintiff filed this suit against the defendant is no proof that any part of the editorials was false, or that the defendant knew it was false or that the defendant was guilty of actual malice. There is no presumption that the plaintiff is entitled to recover damages merely because it commenced this suit and that it has been tried before you. Therefore, unless you believe from a preponderance of the evidence that the editorials or material parts thereof were false, that defendant knew they were false *and* that defendant acted with actual malice *or* with reckless disregard of the truth and consequences, then you should find your verdict in favor of the defendant, Beckley Newspapers Corporation." (Emphasis ours).

"Defendant's Instruction No. 6

The Court instructs the jury that at the time of the publication the plaintiff was a public official and a candidate to succeed himself as Clerk of the Circuit Court of Raleigh County and that the public has a paramount interest in the free flow of information to the public concerning public officials who are the servants of the public. This and anything that related to the plaintiff's fitness for public office was a proper subject for discussion and com-

ment in the editorials complained of. Therefore, the Court instructs the jury that if you believe from the evidence that the subject matter of the language complained of related to the character and attributes of the plaintiff, Harold Hanks, touching his fitness for public office, and if you further believe that such statements and comment were honestly made without actual malice *and* without reckless disregard of their truth or consequences, then it is your duty to return your verdict in favor of the defendant, Beckley Newspapers Corporation." (Emphasis ours).

"Defendant's Instruction No. 11

The court instructs the jury that in this case the plaintiff was a public official and was a candidate for public office. Therefore, he cannot recover damages merely because some part or parts of the editorials may have been false, he must go beyond that and prove that the defendant knew that the editorials or a material part thereof was false *and* that the defendant published these editorials with actual malice *or* with a reckless disregard for the truth or consequences thereof; and unless you believe by a preponderance of the evidence that all of these things have been proved, then you may return your verdict in favor of the defendant, Beckley Newspapers Corporation." (Emphasis ours).

These three instructions separated "actual malice" from knowledge of falsity and reckless disregard of the truth or consequences and it ("actual malice") necessarily had to be equated with hatred, ill-will, revenge, corrupt motive or intent to injure. They represent a concurrence in submitting the two types of malice to the jury. Petitioner now complains of an alternative which

it offered the same jury in above instructions given by the same trial court.

ARGUMENT

This case was tried upon the theory that Petitioner's libellous statements pertained to Respondent in two categories (1) as a private person, and (2) as a public official in performance of his public duties or his activities which had some relation thereto; that the offending writing was that of Emile Hodel who took advantage of his position as an editor to discharge his personal malice toward Respondent through Respondent's newspaper and to intermingle it and disguise it—in reference to Respondent as a public official. But regardless of whether or not the combination of these two approaches may be correct it is submitted that (1) the evidence is constitutionally sufficient to support the trial court's judgment, (2) the decision of the trial court is clearly correct, (3) the trial court's judgment does not establish any precedent that any West Virginia state court is about to, or is likely to, depart from the doctrine of *New York Times v Sullivan,* 376 U. S. 254, or *Rosenblatt v Baer,* 383 U. S. 75, or other subsequent applications of the rule; and (4) the verdict is not excessive to the point of discouraging a free press in the area, or restricting Petitioner from its duty or privilege to criticize public officials.

I

THE EVIDENCE IS CONSTITUTIONALLY SUFFICIENT TO SUPPORT THE VERDICT

Strict application of the doctrine of *New York Times v Sullivan,* 376 U. S. 254 confines the inquiry here to: (1) Did Emile Hodel or some other responsible officer of Petitioner corporation publish the offending words knowing them to be false at the time? or (2) Were they published with reckless disregard of the truth or falsity thereof?

The test may be reduced to consideration of one

charge, to-wit, that respondent had intimidated or threatened another public official in performance of her duty (R. 3). That this was false was clearly shown by the evidence of Respondent and that other official (Tr. 46, 47, 56, 57). There was no contrary evidence whatsoever. There was no inquiry, no investigation, no attempt on part of petitioner to ascertain any facts with reference thereto (Tr. 57-59, 108, 109, 120, 121). No evidence to the contrary was ever offered. Emile Hodel did not testify—though he was editor, writer, neighbor, and the only person who could furnish any adverse evidence. Upon cross-examination of one George Hodel, a business manager of Petitioner who was not responsible for the offending editorials (Tr. 89, 106), he was asked "Those editorials were not written by anybody who wanted to find out whether or not he (referring to respondent) threatened Mrs. Hurt, were they?" To this the witness answered "There was cause on their part to feel there was that *possibility*." (Emphasis ours). (Tr. 121). This is the high water mark of Petitioner's responsibility to the public. The "cause" was never explained or developed. The record stands that Emile Hodel *felt* that there might be a *possibility* that Respondent threatened or intimidated another official, and upon that basis Petitioner hurled libellous statements and implications against Respondent to its readers. What better proof of reckless disregard of the truth or falsity of an accusation? This is not a case of mere negligence, such as overlooking information in a newspaper file or morgue; it does not involve a long distance appraisement of many news stories carried in nationwide dailies or by the wires of the press associations—such as in the *New York Times* case. Here two men confronted each other in a relatively small community and one used his newspaper recklessly to make false accusations against the other. All of the remainder of the trial evidence as well as failure of Petitioner to provide any proof other than a general statement of general policy emphasizes that the opinion or factual statement involved was not made in good faith. Regardless of the court's charge which will

be hereafter discussed the evidence was constitutionally sufficient both within the scope of *New York Times v Sullivan,* 376 U. S. 254 and by comparison with or contrast to the facts of that case.

II

THE DECISION OF THE TRIAL COURT IS CLEARLY CORRECT

1. Review of the record will disclose a personal feud or antagonism in a relatively small community in which one antagonist takes advantage of the fact that he is an editor to make false accusations about another who is a public official, and to tie onto the comments, whether fair or unfair, about public matters, attacks upon Respondent's personal habits of cleanliness, etc.

2. The words complained of, including those concerning Respondent as a public official and as a private person, were libellous, per se. *Re-statement of the Law, Torts,* Vol. 3, p. 165, Sec. 569; 33 *Am. Jur.* 39, 92.

3. The offending charges were proved false to the satisfaction of the jury whose province it was to pass upon this issue. *Re-statement of the Law, Torts,* Vol. 3, p. 308, Sec. 617. And the evidence was adequate to sustain such jury finding. (Tr. 46, 47, 56, 57).

4. Petitioner complains that the trial court's charge to the jury included Plaintiff's Instruction No. 3 (Tr. 133) and that this was a violation of Petitioner's constitutional right because in addition to defining malice as (a) publishing of calculated falsehood, or (b) reckless disregard of the truth or falsity thereof, said Instruction No. 3 contained, in the alternative, the words "or used them with bad or corrupt motive" and "or published them with hatred, or revenge, or from personal spite, ill will or a desire to injure plaintiff." (Tr. 133). These words of course are descriptive of malice in fact—in its usual everyday connotation—*actual malice*—in fact. There are also still acceptable definitions of actual mal-

ice in law in cases involving suit by a private person against another, including a person hiding behind the office of editor of a newspaper, and a newspaper corporation itself. 33 *Am. Jur.* 113, Sec. 111. It is only in recent cases involving criticism of public officials or those in the vortex of public discussion that "actual malice" in law has been shrunk to requirements of (a) calculated falsehood or (b) reckless disregard of truth or falsity.

Plaintiff's Instruction No. 3 was obviously so worded because of the two-fold approach of alleged libel of the Respondent as a public official *and* as a private person. If this was an improperly combined approach, or if one who is public officer cannot escape that capacity regardless of the nature of the libellous words used, nevertheless the jury verdict and trial court's judgment thereon was clearly correct for the following reasons: *First,* when Plaintiff's Instruction No. 3 was offered Petitioner did not object specifically to the inclusion of the emphasized words, and the general objections used must be greatly strained to establish such objection by implication, particularly in the light of the instructions offered by Petitioner which were given by the court, namely, Defendant's Instructions Nos. 2, 6, and 11. *Second,* said Defendant's Instructions Nos. 2, 6, and 11, in addition to defining the required malice as (a) calculated falsehood or (b) reckless disregard of truth or falsity, added the *alternative* of "actual malice"—which the court and jury could well and reasonably accept as the same alternative as set forth in Plaintiff's Instruction No. 3.

Petitioner made three unsuccessful attempts to obtain an appeal from the West Virginia Supreme Court of Appeals. *West Virginia Rules of Civil Procedure Rule* 51 reads in part:

> "No party may assign as error the giving or the refusal to give an instruction unless he objects thereto before the arguments to the jury are begun, stating distinctly, as to any given

instruction, the matter to which he objects and the grounds of his objection . . . . . ."

The failure to follow this *Rule* 51, or the procedure embodied therein, has been held to deny consideration of the alleged point of error, upon appeal. *Nesbitt v Flaccus*, 149 W. Va. 65, 138 S. E. (2d) 859; *Poe v Pittman*, (W. Va.) 144 S. E. (2d) 671; *Mills v Inter-Ocean Casualty Co.*, 127 W. Va. 400, 33 S. E. (2d) 90; See also: *Palmer v Hoffman*, 63 S. Ct. 477, 318 U. S. 109, 87 L. Ed. 645.

Furthermore since Petitioner invited the jury to consider the same alternative by using the words "actual malice" in context of its Instructions Nos. 2, 6 and 11, as the equivalent of bad or corrupt motive, hatred or personal spite, Petitioner cannot now be heard to complain that the jury was misled to its prejudice because Respondent's Instruction No. 3 spelt out such alternative "actual malice" in the definitive words of actual common everyday concept, and as heretofore set forth in the legal concept, thereof. *Slaughter v Valleydale Packers, Inc.*, 198 Va. 339, 94 S. E. (2d) 260. Errors induced by both parties cannot be relied upon by either in the appellate court. *Foard v Harwood*, 113 W. Va. 619, 169 S. E. 465.

III

THE JUDGMENT OF THE CIRCUIT COURT OF WYOMING COUNTY HEREIN DOES NOT ESTABLISH ANY PRECEDENT FOR ANY WEST VIRGINIA COURT TO DEPART FROM THE DOCTRINE OF NEW YORK TIMES V SULLIVAN, 376 U. S. 254, OR SUBSEQUENT PERTINENT DECISIONS,

No opinion was written or published by either the Circuit Court of Wyoming County or the West Virginia Supreme Court of Appeals, nor does the judgment order complained of contain any statement of doctrine or any ground for its decision. The case does not pertain to any

other case and the decision is not binding in any other case. *In re Nat. Bank of West Virginia,* 137 W. Va. 673, 73 S. E. (2d) 655.

The Petitioner attempts to demonstrate the importance of the question raised by reference to a recent action against the same Petitioner by the Mayor of Beckley, wherein the complaint is cast in the same general language of common law civil libel heretofore found in the form books. This action is only in the early stages of complaint and answer. It would be, and is, highly presumptuous to conclude from the filing of that suit and from the fact that the face of the complaint is cast in traditional form book language pertaining to civil libel that (a) the *facts* are the same or similar to the instant case, (b) the complaint will not be amended to put the language more in line with the doctrine of *New York Times v Sullivan,* 376 U. S. 254, (c) that the case will be incorrectly tried and an instruction identical to Plaintiff's Instruction No. 3 will be offered by plaintiff and given by the Court, (d) that the trial court will not follow the proper legal rules with reference to "actual malice" where public officials are criticized, (e) that Petitioner's counsel therein will fail to object to specific inclusion of an incorrect definition of malice or will offer similar instructions on Petitioner's behalf, or (f) that the West Virginia Supreme Court of Appeals will wrongly apply the law when grounds of error are properly presented to it.

IV

TO SUSTAIN THE JUDGMENT IN THIS CASE WILL NOT DENY PETITIONER ITS DUTY OR PRIVILEGE OF CRITICIZING RESPONDENT OR OTHER PUBLIC OFFICIALS HEREAFTER.

In this particular case there is no evidence or reason to believe that a judgment of $5,000.00 against Petitioner will drive its papers out of business or restrict its

criticism. Petitioner has filed as Appendix E with the Petition a copy of the complaint in another later action against Petitioner by the Mayor of Beckley. By reference thereto it will be seen Petitioner was not silenced or even discouraged by the verdict herein in May, 1966 or the judgment thereon in June 1966. And Petitioner's general manager in his testimony in this case, long before the Smith case was filed boasted "This isn't the first time we've been sued." (Tr. 117). Nor is there reason to assume a verdict of $5,000.00 will bankrupt the Beckley Newspaper Corporation just because Beckley and vicinity has less population than New York and petitioner's circulation is less than that of the New York Times.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 16, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

BECKLEY NEWSPAPERS CORPORATION *v.* HANKS.

ON [redacted] WRIT OF CERTIORARI TO THE CIRCUIT COURT OF [redacted]EST VIRGINIA, WYOMING COUNTY.

No. 467. Decided November 6, 1967.

PER CURIAM.

The petition for certiorari is granted.

Respondent Hanks is the elected Clerk of the Criminal and Circuit Courts of Raleigh County, West Virginia. He brought this libel action in the West Virginia Circuit Court, Wyoming County, alleging that during his re-election campaign he was libeled by three editorials, highly critical of his official conduct, which appeared in petitioner's morning newspaper. The jury returned a verdict for respondent and awarded him $5,000 damages. The State Supreme Court of Appeals denied petitioner's application for appellate review.

Although this action was tried subsequent to the decisions of this Court in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Henry* v. *Collins*, 380 U. S. 356 (1965); and *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966), and despite the fact that it was recognized at trial that the principles of *New York Times* were applicable, the case went to the jury on instruction which were clearly impermissible. The jury was instructed in part that it could find for the respondent if it were shown that petitioner had published the editorials "with bad or corrupt motive," or "from personal spite, ill will or a desire to injure plaintiff." Because petitioner failed to object to this erroneous interpretation of *New York Times* at trial, and in fact offered instructions which were themselves inadequate,

the issue of these instructions is not before us. However, since it is clear that the jury verdict was rendered upon instructions which misstated the law and since petitioner has properly challenged the sufficiency of the evidence, we have undertaken an independent examination of the record as a whole "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times* v. *Sullivan*, *supra*, at 285. See *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 156–159 (1967) (opinion of MR. JUSTICE HARLAN); *id.*, at 168–170 (opinion of THE CHIEF JUSTICE).

In *New York Times* we held that the Constitution forbids recovery of damages in a civil libel action by a public official, such as respondent, "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S., at 279–280. Our examination of the whole record satisfies us that "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands . . . ." 376 U. S., at 285–286.

We put aside the question whether the proofs show that the allegedly libelous statements were false. If false, respondent did not and does not contend that petitioner published the statements with knowledge of their falsity. His contention was and is that the proofs were sufficient for the jury to find that petitioner published the statements with reckless disregard of whether they were false or not. However, virtually the only evidence we find bearing on that question relates to one of the editorials critical of the opposition of respondent and another public official, Mrs. Elinor Hurt, president of the county board of health, to fluoridation of the local water supply. That editorial, captioned "The Fluoridation Situation Remains Unchanged," was directed

primarily at Mrs. Hurt's opposition* but also included the following:

> "Here again, [Mrs. Hurt] seems to want to follow in the footsteps of Hanks. For it was Hanks who ordered over the telephone once that he did not want his name to appear in the Beckley Post-Herald again. He backed up this order with an inexplicit threat—one merely intended to frighten those who are easily intimidated.
>
> "The only conclusion to which we can come is that either Hanks or Mrs. Hurt have been in league toward the fanatic end, believing all the wild-eyed ravings against fluoridation despite decades of experience to disprove them, or that *perhaps his blustering threats were able to intimidate the lady.*" (Emphasis added.)

Respondent's argument is that since both he and Mrs. Hurt testified and denied any threats or intimidation, the following testimony of petitioner's president and general manager on cross-examination provides "convincing proof" of the absence of prior investigation which entitled the jury to find that the "offending charges" were published with reckless disregard of whether they were false or true:

> "Q. But you can't tell this jury that any special investigation was made before this man was attacked in any of these articles, can you?
>
> . . . . . .
>
> "A. . . . We watch the activities of the public servant. You don't have to make an investigation. His whole life is out in front of everybody.
>
> "Q. Those editorials were not written by anybody who wanted to find out whether or not he threatened Mrs. Hurt, were they?

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*When asked whether she had ever brought suit against petitioner for these or other statements, Mrs. Hurt replied, "No, sir, I have big broad shoulders." (Tr. 49.)

"A. There was cause on their part to feel there was that possibility.

"Q. That possibility?

"A. That's right. 'Perhaps,' they said. . . . It was our opinion that that was as near the facts and truth as we could get." (Tr. 121–122.)

We reject respondent's contention. Neither this passage nor anything else in the record reveals "the high degree of awareness of . . . probable falsity demanded by *New York Times* . . . ." *Garrison* v. *Louisiana*, 379 U. S. 64, 74; it cannot be said on this record that any failure of petitioner to make a prior investigation constituted proof sufficient to present a jury question whether the statements were published with reckless disregard of whether they were false or not. Cf. *New York Times* v. *Sullivan*, *supra*, at 287–288; *Time, Inc.* v. *Hill*, 385 U. S. 374, 388–389 (1967). See also *Curtis Publishing Co.* v. *Butts*, *supra*, at 153–154 (opinion of MR. JUSTICE HARLAN).

The judgment is reversed, and the case remanded to the Circuit Court of West Virginia, Wyoming County, for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, whom MR. JUSTICE DOUGLAS joins, concurs in the result for the reasons stated in his concurring opinions in *New York Times* v. *Sullivan*, 376 U. S. 254, 293, and *Garrison* v. *Louisiana*, 379 U. S. 64, 79.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.